No. 82-912

IN THE

Supreme Court of the United States

October Term, 1982

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

vs.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

FREDRIC D. WOOCHER
LUCAS GUTTENTAG*
MARILYN O. TESAURO
BILL LANN LEE
CARLYLE W. HALL, JR.
JOHN R. PHILLIPS
Center for Law in the
Public Interest
10951 W. Pico Boulevard
Los Angeles, Calif. 90064
(213) 470-3000

Attorneys for Appellees

Of Counsel:
TRACY WESTEN

**Counsel of Record*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

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JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1252. However, the Government's failure to have filed its notice of appeal within the time prescribed by Supreme Court Rule 11.3 defeats jurisdiction in this Court. The lack of jurisdiction resulting from the Government's premature, and thus invalid, filing of its notice of appeal is fully discussed in appellees' Motion to Dismiss or Affirm, at 11-13.[1]

[1]Appellees have little to add on the jurisdictional issue, although two points raised in the Government's Reply Memorandum merit brief response. First, *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982), has no bearing on the instant question. There, the Court held that a request for attorneys' fees, filed four and one-half months after the entry of a final judgment, did not constitute a "motion to alter or amend" under Fed. R. Civ. P. 59(e). Here, the District Court awarded attorneys' fees in its judgment, following which the Government filed a true Motion to Alter or Amend pursuant to Rule 59(e). As such, the motion

(footnote continued on following page)

STATEMENT

Appellees brought this lawsuit to vindicate their rights to express and receive the views of noncommercial broadcasters on issues of public importance.[2] The District Court agreed that the First Amendment guarantees of freedom of speech and freedom of the press are directly and unjustifiably violated by 47 U.S.C. § 399, which prohibits "editorializing" by any noncommercial educational broadcasting station that receives a grant from the Corporation for Public Broadcasting. As the court found, § 399 outlaws speech that lies at the very heart of the First Amendment, and the government interests purportedly served by the statute are far too speculative to support its abridgment of fundamental constitutional rights.

In somewhat paradoxical fashion, however, the Government argues that the "special history, character, and needs" of noncommercial licensees actually demand the *suppression* of their editorial

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suspended the finality of the judgment, rendering untimely and ineffective the intervening notice of appeal to this Court.

Second, even though preliminary and final orders holding acts of Congress unconstitutional are immediately appealable under 28 U.S.C. § 1252, it does not follow that such an order may be appealed while a motion to alter or amend is pending in the district court. Rule 59(e) was adopted in order to "make . . . clear that the district court possesses the power" to rectify its own mistakes. Advisory Committee on Rules for Civil Procedure, 5 F.R.D. 433, 476 (1946). This power exists whether the court's ruling is interlocutory or final. For reasons of judicial economy and comity, even an appealable interlocutory ruling must nevertheless be "final," in the sense that the court is not still considering or reconsidering its decision. Accordingly, the fact that jurisdiction in this case lies under 28 U.S.C. § 1252 does not affect the invalidity of the Government's attempt to appeal while its motion to alter or amend was pending before the District Court.

[2]Appellee Pacifica Foundation is a nonprofit educational corporation that owns and operates noncommercial broadcasting stations in five major markets. Pacifica was founded in 1949 with the explicit objective of providing the public with access to a diverse range of opinions and ideas. *See* H. Hoffman, *Pacifica and the Idea of Freedom* (1965). Appellee League of Women Voters of California is a nonprofit, nonpartisan organization devoted to promoting political responsibility through the informed participation of citizens in self-government. Appellee Henry Waxman is a United States Congressman and a listener and viewer of noncommercial broadcasting. J.S. App. 6a.

viewpoints in order to further First Amendment values. Appellees therefore begin by reviewing the development and structure of noncommercial broadcasting in this country, in order to demonstrate that § 399 is antithetical not only to the tradition of freedom of speech and a free press, but to the very role that noncommercial broadcasting was designed to serve in our society.

Noncommercial Broadcasting and Section 399

In the beginning, there was noncommercial broadcasting — and only noncommercial broadcasting. In fact, the first four hundred radio stations licensed in this country were all noncommercial.[3] Many of them were operated by educational institutions: Some broadcast adult education courses; others enlightened their communities with a variety of programs; but none of these stations sold air time.[4] The first commercial radio station (WEAF) was inaugurated in August, 1922,[5] and in the decades that followed, broadcasting attracted a strong following. Although commercial stations soon outnumbered their noncommercial counterparts, many noncommercial stations endured, and their programming provided an important alternative to sponsored broadcasting for millions of Americans.[6]

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[3]E. Barnouw, *The Sponsor: Notes on a Modern Potentate* 9-10 (1978) ("*Sponsor*"). The first radio station began broadcasting in 1919 from the University of Wisconsin. S. Frost, *Education's Own Stations* 464 (1937).

[4]E. Barnouw, *Sponsor* 12.

[5]*Id.* at 15.

[6]By 1945, noncommercial broadcasting had so established itself that the Federal Communications Commission (FCC) decided to allocate 20 of the 100 frequencies on the new FM spectrum exclusively for noncommercial educational use. *1983 Broadcasting/Cablecasting Yearbook* A-6 ("*1983 Yearbook*"). Seven years later, the FCC made a similar assignment of television channels to noncommercial stations in 242 communities. Carnegie Commission on the Future of Public Broadcasting, *A Public Trust* 33-34 (1979) ("*Carnegie II*"). Although a majority of the noncommercial stations today are licensed to broadcast over these reserved frequencies, many — including WNET in New York City, the largest noncommercial television station in the country — operate on nonreserved channels. In fact, over 125 noncommercial radio and television stations, including two of appellee Pacifica's stations, operate on nonreserved frequencies. *1983 Yearbook* B-336 to 368, C-79 to 81.

It was not until 1962 that the federal government provided any financial assistance to noncommercial broadcasting. During their first forty years, noncommercial stations had supported themselves through private contributions and funding from state and local governments and educational systems. Most of the early stations had been affiliated with colleges and universities, but the 1950s saw the development of many noncommercial stations that were owned and operated by private, nonprofit community organizations. Deriving much of their income from donations, auctions, and foundation grants, these stations had begun to broadcast programs of more general cultural and educational interest.[7] With the passage of the Educational Television Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64, Congress recognized the great potential of these stations and attempted to stimulate their growth throughout the country by authorizing the former Department of Health, Education and Welfare (HEW) to distribute $32 million in matching grants over a five-year period for the construction of noncommercial television facilities.

Thus, on the eve of the landmark 1967 Carnegie Report,[8] there were already several hundred noncommercial broadcasters "provid[ing] a much needed source of cultural and informational programming for all audiences . . . ." H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962). No stations were operated by the federal government; indeed, they had received only minimal federal funding.[9] Noncommercial licensees, like their commercial counterparts, operated as independent journalistic entities vested with the broadest discretion to determine the content of their broadcasts — a discretion which they exercised to present informative, innovative, and sometimes controversial programs geared to the specific needs of their community. Only the chronic underfinancing of noncommercial broadcasting darkened its bright future.

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[7]E. Barnouw, *Sponsor* 59-61.

[8]Carnegie Commission on Educational Television, *Public Television: A Program for Action* (1967) ("*Carnegie I*").

[9]Federal assistance to the 124 noncommercial television stations then in operation amounted to barely 5% of their cumulative historical financial support (*Carnegie I*, at 21, 250 (Table II)), and the over 300 noncommercial radio stations had received no federal support at all.

Against this background, the prestigious Carnegie Commission recommended a significant increase in federal assistance to noncommercial broadcasting, concluding that a well-financed educational broadcasting system was imperative in order to provide "all that is of human interest and importance which is not at the moment appropriate or available for support by advertising . . . ." *Carnegie I*, at 1. The Commission called upon the federal government to supplement the existing state, local, and private funding of noncommercial broadcasting, so that it could realize its full potential as a truly complementary alternative to the commercial system. *Id.* at 227-34.

The Carnegie Report realized that an expanded federal role in financing "public"[10] broadcasting would require that special care be taken to preserve the two principles underlying the American system of broadcasting: independent local stations serving the needs of their community are the "bedrock" of the system; and the federal government cannot be permitted to interfere with programming content. The Commission therefore recommended the creation of a private, nongovernmental, nonprofit corporation to receive and disburse funds for program production, to shield stations from governmental or political pressures, and to provide leadership for an expanded national interconnection system. *Id.* at 5, 36-41.

The Carnegie Report met with widespread approval, and its proposals were the basis of the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified at 47 U.S.C. §§ 390 *et seq.*). The Act reflected Congress' acknowledgment of the tremendous value of an expanded noncommercial broadcasting system in furnishing a diversity of viewpoints on issues of public concern.[11] Titles

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[10]The Commission coined the term "public" television not to suggest that noncommercial licensees may be subjected to greater government controls than their commercial colleagues, but merely to "dramatize the emphasis on programming for general enrichment and entertainment, as well as for classroom instruction." *Carnegie II*, at 35.

[11]As the Senate Report concluded: "Particularly in the area of public affairs your committee feels that noncommercial broadcasting is uniquely fitted to offer indepth coverage and analysis which will lead to a better informed and enlightened public." S. Rep. No. 222, 90th Cong., 1st Sess. 7 (1967). It is noteworthy that at the time the Senate Report was written, the bill did not contain a ban on editorializing.

I and III of the legislation set aside over $38 million to continue HEW's construction grants program for three more years and to finance a study of instructional television. But the heart of the Act was Title II, which authorized $9 million to create and fund the Corporation for Public Broadcasting (CPB), an independent, nonprofit private corporation that would disburse federal and other aid[12] to selected stations and other entities for the production and/or acquisition of educational programming.

Congress took great pains to ensure that the legislation established no inroads on the local licensees' autonomy. Two levels of safeguards were provided: CPB was insulated from the threat of government or political influence, and local stations were protected from any possible coercion by CPB.[13] Perhaps most important, the funding of local stations was removed entirely from the political process. CPB grants to licensees must be made in accordance with

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[12]CPB receives substantial funds from nonfederal sources. For example, in February 1981, CPB was given $150 million by the Annenberg School of Communications for the support of telecommunications technologies in higher education. CPB, *Annual Report 1981*, at 14.

[13]For example, the Act expressly declares that CPB was created "to afford maximum protection from extraneous interference and control." 47 U.S.C. § 396(a)(7). To guarantee CPB's independence from government control, the Act provides that the Corporation "will not be an agency or establishment of the United States Government" (§ 396(b)), and it prohibits any federal agency or employee from exercising "any direction, supervision, or control" over noncommercial stations, CPB, or any of its grantees (§ 398(a)), or over "the content or distribution" of noncommercial programs and services (§ 398(c)). To ensure that CPB remains free from political influences, the Corporation is governed by a bi-partisan board of directors (§ 396(c)(1)), none of whom can be employed by the federal government (§ 396(c)(2)); no political considerations can enter into its personnel actions (§ 396(e)(2)); and it may not contribute to or support any political party or candidate (§ 396(f)). Furthermore, to protect the autonomy of noncommercial stations, CPB is prohibited from owning or operating any broadcast station, network, interconnection system, or production facility (§ 396(g)(3)(A)), and from producing, scheduling, or disseminating programs to the public (§ 396(g)(3)(B)). In addition, the Act requires the Corporation to carry out its functions "in ways that will most effectively assure the maximum freedom" of local stations from interference with their program content (§ 396(g)(1)(D)).

pre-determined, nondiscretionary objective criteria.[14] In short, the Public Broadcasting Act established a framework that guaranteed as fully as possible the freedom of local stations from government or political influence. Congress relied upon procedural safeguards to ensure that its funds would be spent as intended[15] and eschewed even the slightest intrusion into the licensee's journalistic independence.

But there was one significant exception. In a break from existing law, FCC policy, and broadcasting practice, the Act for the first time imposed restrictions on the content of the station's programming:

> No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

47 U.S.C. § 399 (1967).[16] Violation of § 399 is punishable by a range of sanctions, including license revocation, denial of license renewal, and imposition of criminal penalties for willful and knowing transgressions. 47 U.S.C. § 501.

The legislative history behind § 399 is sparse. Neither the Administration proposal nor the bill that had passed the Senate contained any such restriction. Not until the House Committee was considering its version did the issue of editorializing arise. Prior to 1967, all

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[14]The Act specifies how CPB is to divide its appropriations between television and radio, and between stations and program production entities (§ 396(k)(3)(A)). Grants to individual licensees are then made pursuant to a pre-determined mathematical formula based upon objective criteria such as their market size and their share of the total non-federal funding sources in preceding years. *See* "CSG Eligibility Criteria," in CPB, *1980-81 Comprehensive Community Service Grant Review*.

[15]For example, noncommercial stations are subject to special requirements governing recordkeeping and audits (§ 396(1)(3)(B)), financial disclosure (§ 396(k)(5)), and open meetings (§ 396(k)(4)).

[16]In 1973, the editorializing ban was redesignated as § 399(a), when Congress added a companion provision, § 399(b), which required noncommercial broadcasters receiving federal funds to make audio recordings of all broadcasts "in which any issue of public importance is discussed." That provision was ruled unconstitutional in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc), and was subsequently repealed, returning § 399 to its original enumeration.

stations — whether commercial or noncommercial — had been permitted to editorialize freely.[17] Indeed, the FCC regarded editorializing as an important aspect of the licensee's obligation to broadcast "in the public interest." *See In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949) ("*Editorializing Report*"); *Programming Statement*, 25 Fed. Reg. 7295 (1960). Yet in the House deliberations, the right of noncommercial broadcasters to express their own views suddenly came under attack. As Rep. William Springer, § 399's sponsor, explained, "There are some of us who have very strong feelings because they have been editorialized against." Hearings Before the House Committee on Interstate and Foreign Commerce on the Public Television Act of 1967, 90th Cong., 1st Sess. 641 ("*House Hearings*"). When the Senate acceded to the House's addition of § 399, the ban on editorializing became a part of the Act, and the over 500 noncommercial stations then broadcasting — including hundreds that would never receive a penny of federal aid — were barred from airing their viewpoints on all public issues.

Proceedings Below

Appellees filed this action on April 30, 1979. The Department of Justice, representing the FCC, responded by notifying the District Court that it could not and would not attempt to defend the constitutionality of § 399.[18] The Senate, appearing as *amicus curiae*, then

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[17]The permissibility of editorializing had briefly been placed in doubt by the FCC's decision in *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339-41 (1940), which held that a broadcaster's advocacy of its own partisan views to the exclusion of all others did not serve the public interest. Because many viewed *Mayflower* as rejecting licensee editorializing, the FCC shortly thereafter instituted a rulemaking and clarified that broadcaster editorializing was not inconsistent with the public interest as long as an opportunity was provided for the presentation of opposing viewpoints. *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

[18]Attorney General Civiletti explained:

> After careful consideration, we have concluded that Section [399] violates the First Amendment guarantees of freedom of speech and freedom of the press by restricting the ability of public broadcasting stations to comment on matters of public interest. While not every restriction on expression is necessarily unconstitutional, such restrictions must serve some compelling state interest. We have not been

obtained dismissal of the lawsuit for want of a justiciable controversy. While an appeal from that decision was pending, the Department of Justice under the new Administration reversed its position and announced that it would both enforce and defend the challenged statute. The District Court therefore vacated its order of dismissal and recalendared appellees' motion for summary judgment. Before argument could be heard, however, Congress amended § 399 to its present form, separating the prohibition against editorializing from the ban on political endorsements and limiting its scope to those stations that receive grants from CPB.[19] Appellees amended their complaint to reflect this change, challenging only § 399's ban on public-issue editorializing.[20]

> able to identify any compelling governmental interest served by Section [399] which would justify the statute's prior restraint on speech. Furthermore, even if the Department of Justice could fashion an argument that the statute serves a compelling government interest, the statute would still be constitutionally defective on grounds of overbreadth since public broadcasting stations receiving no federal funds are covered. Finally, we have concluded that there are less restrictive means to achieve the suggested purposes of the statute.
>
> The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the challenged statute.

Letter from Attorney General Benjamin R. Civiletti to Senate Majority Leader Robert C. Byrd, October 11, 1979 (J.A. 13-14).

[19]The current language of § 399 is set out in Appendix A. The 1981 amendment was not, as the Government suggests, "of little practical significance." Govt. Brief 26. It freed from § 399's concededly unconstitutional restrictions over 800 noncommercial stations that received no federal funds. *See* Letter from Atty. Gen. Smith to Sen. Thurmond (J.A. 15-16). Of the 1374 noncommercial television and radio stations currently broadcasting (FCC News Release, *Broadcast Station Totals for June 1983* (June 16, 1983)), only 532 received CPB grants in 1981. CPB, *Annual Report 1981*, at 4.

[20]Because the Government repeatedly refers to its purported interest in preventing "electioneering" and "partisan" editorializing, it is worth emphasizing that the ban on political endorsements is not at issue here. Appellee Pacifica does not contemplate endorsing candidates for political office, and instead seeks only the freedom to express its views on issues of public importance.

On August 6, 1982, the District Court granted summary judgment, declaring § 399's editorializing prohibition unconstitutional. Finding that noncommercial broadcasters were entitled to the full panoply of First Amendment protections, the court held that the Government had failed to establish that § 399 was narrowly tailored to serve a compelling interest. (J.S. App. 17a-18a.) In light of the diverse funding sources of noncommercial stations, the safeguards built into the system to ensure that noncommercial broadcasters remain free of government control, and the fairness doctrine's protection against one-sided presentation of controversial issues, the court found no support for the asserted fear of government propagandizing. (J.S. App. 12a-15a.) Similarly, the court concluded that the alleged interest in fostering the balanced presentation of opinion on CPB-funded stations was not sufficiently compelling to justify § 399's ban on protected speech. (J.S. App. 15a-17a.)

SUMMARY OF ARGUMENT

Section 399 categorically prohibits noncommercial broadcasters that receive grants from CPB from expressing their views on public issues. The statute violates fundamental First Amendment principles by suppressing speech on the basis of its content. By its express terms, § 399 discriminates among different types of speech and bars expression of only one kind — opinions on issues of public importance. Moreover, the statute prohibits only one class of speaker — the CPB-subsidized noncommercial licensee — from communicating its views on these issues.

I.

Section 399's ban on editorializing strikes at the very heart of the First Amendment. By prohibiting the broadcaster from expressing its opinions on public issues, the statute muzzles one of the very institutions that the Constitution selected to inform society and keep it free. Section 399 not only denies the licensee the right to be heard, but it infringes upon the paramount right of the public to receive information from a diverse range of sources.

Nothing in the nature of broadcasting justifies anything but the most stringent First Amendment scrutiny in assessing the constitutionality of § 399. The central teaching of this Court's opinions in the area of broadcast regulation is that the public's right to be informed is best served by maximizing the number and diversity of

viewpoints expressed over the airwaves. Section 399's censorship of the broadcaster's editorial opinion has exactly the opposite intent and effect. Nor does the "special character" of noncommercial broadcasting require suppression of the licensee's views on public issues. Indeed, as the FCC itself has long recognized, the station's expression of its editorial opinion is an essential element in its ability to fulfill what the Government itself asserts to be its intended societal function: to educate, challenge, and at times disturb.

Because the CPB-funded noncommercial broadcaster's editorial speech is fully protected by the First Amendment, § 399 can be upheld only if the Government demonstrates that it is the most narrowly drawn restriction necessary to serve a compelling state interest. Yet the two alternative justifications advanced by the Government are far from compelling, and the statute furthers those purported objectives only marginally at best.

The asserted interest in preventing CPB-funded stations from becoming outlets for the propagation of "private" viewpoints rests on the erroneous premise that Congress "created" noncommercial broadcasting and therefore can shape it in its own image by banning the expression of any controversial views. But Congress did not "create" noncommercial broadcasting any more than it "created" the myriad other communicative enterprises that it subsidizes, from the print media to commercial broadcasting. Moreover, there is no basis for assuming that permitting noncommercial broadcasters to editorialize will lead to the exploitation of their facilities for the propagation of partisan ends. Further, § 399's ban on editorializing bears no relevant correlation to its purported objective: on the one hand, the statute suppresses editorials that cut across partisan lines and pose no danger to the asserted interest; on the other hand, it concededly permits partisan editorials by anyone other than the licensee itself, and it does nothing to prevent bias from infusing any other programming format.

Similarly, the purported interest in preventing noncommercial broadcasting from becoming a vehicle for the dissemination of government propaganda is entirely speculative, and the editorializing ban responds to that concern in an impermissible and irrational manner. As the District Court found, CPB's independent structure and nondiscretionary grant-making procedures, the diversity of the stations and their funding sources, and the fairness doctrine's re-

quirement that coverage of public issues be balanced, combine to ensure that the broadcasters will not be vulnerable to any hypothetical government attempt to influence their editorials. More fundamentally, to silence the broadcaster in order to eliminate the theoretical possibility of government interference with the content of its programming stands the First Amendment on its head. The remedy for any feared imbalance in the marketplace of ideas is more speech, not less speech. Finally, there is no rational relationship between the asserted interest in preventing government propaganda and § 399's ban on all licensee editorials, even those on local issues having no bearing on the federal government.

II.

Because § 399 applies selectively to only one type of broadcasting facility and restricts the speech of only one speaker on one subject matter, it also violates the First and Fifth Amendment guarantees of Equal Protection, for none of the statute's discriminations is even reasonably related to the purported interests behind its ban on editorializing. For example, editorializing by the licensee itself is prohibited, while exactly the same opinions may be voiced by anyone else the station lets on the air. If anything, however, these individual opinions are more "private" than those of the noncommercial licensee; and since the station is concededly free to select who shall speak over its facility, there is no greater danger that the licensee would espouse government propaganda than would its chosen representative. Such irrational discriminations permeate § 399 and undermine the plausibility of the Government's alleged justifications for the editorializing ban.

III.

By requiring the noncommercial broadcaster to forfeit its right to editorialize in order to receive a CPB grant, § 399 also violates the principle that the government may not condition a public benefit on the relinquishment of constitutional rights. Section 399's ban on editorializing is very different from the limits on lobbying by tax-exempt organizations upheld in *Regan v. Taxation With Representation*, 103 S.Ct. 1997 (1983). Section 399 does not merely provide that Congress will not pay for the noncommercial broadcasters' editorial speech; it flatly prohibits them from editorializing even with their own private funds. Section 399 impermissibly forces the

noncommercial broadcaster to choose between retaining its right to editorialize or receiving the CPB grant to which it is entitled for its non-editorializing activities. The statute thus requires the broadcaster to abandon a central element of its First Amendment rights in order to receive its governmental benefit.

ARGUMENT

I. SECTION 399'S BLANKET SUPPRESSION OF THE NONCOMMERCIAL BROADCASTERS' EDITORIAL VOICE VIOLATES THE FIRST AMENDMENT GUARANTEES OF FREEDOM OF SPEECH AND FREEDOM OF THE PRESS.

Section 399 is a direct, government-imposed restraint on the noncommercial broadcaster's freedom to express its views on issues of public importance. The statute categorically proscribes speech occupying the "highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 102 S.Ct. 3409, 3426 (1982). Worse yet, § 399 selectively prohibits one class of speaker — the CPB-subsidized noncommercial licensee — from communicating its opinions based solely on the content of that speech. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("*Bellotti*").[21]

Accordingly, § 399's ban on editorializing is presumptively unconstitutional, and the burden rests squarely on the Government to demonstrate that it is the most narrowly drawn regulation necessary to further a compelling state interest. *E.g.*, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980). It is a

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[21]The Government suggests that § 399 is not content-related because its prohibition against editorializing is purportedly viewpoint-neutral. Govt. Brief 41, 46. The identical argument was flatly rejected in *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980), in which this Court held unconstitutional a state order barring utility companies from including bill inserts that express "their opinions or viewpoints on controversial issues of public policy." *Id.* at 533. The Court there explained:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.

Id. at 537-38. *Accord, Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 518-19 (1981).

burden that the Government cannot carry, for any legitimate interests that § 399 allegedly serves are far from compelling, and its absolute prohibition of editorializing is not the least restrictive means of achieving those ends.

A. Section 399 Suppresses Speech That Is Entitled to the Fullest Protection in Our Constitutional Framework.

1. The Noncommercial Broadcaster's Editorial Opinions Lie at the Very Heart of the First Amendment.

Preservation of the free flow of information has long been recognized as the core purpose of the First Amendment.[22] The vigorous, open discussion of public issues plays a critical role in our representative system of government. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("*Red Lion*") (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). Yet it is precisely this "uninhibited, robust, and wide-open" debate on public issues that § 399 restricts. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Moreover, in prohibiting the noncommercial broadcaster from editorializing, § 399 silences one of the very institutions whose freedom of speech "is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Bellotti, supra*, 435 U.S. at 781. The media are the "eyes and ears" of the public, seeking out the news, awakening interest in the conduct of government, offering criticism and proposing changes, and engaging the public in a "dialogue in ideas." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976); *Grosjean v. American Press Co.*, 297

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[22] *E.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment"); *Bellotti, supra*, 435 U.S. at 776. The guarantees of freedom of speech and of the press protect not only the individual's interest in self-expression, but the societal interest in the attainment of truth. *Id.* at 777 n.12; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

U.S. 233 (1936).[23]

Because the untrammeled freedom of the media to express its views is so indispensable to its dual societal responsibilities as educator and watchdog, this Court has not hesitated to strike down any attempt to restrict what the media can say and what the public can hear. Thus, in *Mills v. Alabama*, 384 U.S. 214 (1966), the Court invalidated a law that, despite its benevolent purpose, had the effect of prohibiting editorializing on the day of an election. Concluding that it was "difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press," the Court explained:

> Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

384 U.S. at 219. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Section 399 suffers from the same constitutional infirmities as the statute in *Mills*. By denying the broadcaster the right to editorialize, § 399 strips the station of one of its most effective means of communicating with the public and contributing to the welfare of the community. *See* E. Routt, *Dimensions of Broadcast Editorializing* 9 (1974); Brief of *Amici Curiae* CBS, Inc., et al., at 3-5. An editorial educates, explains, and often moves the public to action. It is the vehicle by which the broadcaster can offer the product of its study and suggest alternatives to current policies. Because it represents the considered opinion of a respected institution, the station's viewpoint deserves and receives high regard from the audience. In addition, editorial opinion frequently provokes a response, thereby creating a two-way flow of information that draws

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[23]Indeed, it has been suggested that the Framers intended the press to be a fourth institution outside the government, serving as a check on the three official branches, and that the press clause was specifically included in the Constitution to ensure that the government could not "convert the communications media into a neutral 'market place of ideas.' " *See* Stewart, "*Or of the Press*," 26 Hastings L.J. 631, 636 (1975). Yet this is what the Government has attempted to do under § 399.

citizens into the active affairs of their government. *See* Fang & Whelan, *Survey of Television Editorials and Ombudsman Segments*, 17 J. Broadcasting 363, 370 (1973).[24]

Thus, contrary to the very premise of the Government's argument — that editorializing is somehow incompatible with the "public mission" of noncommercial broadcasting — the freedom to express its institutional views on public issues is essential to the noncommercial station's ability to fulfill its intended societal function: "to educate, broaden, challenge, enlighten, and at times disturb." Govt. Brief 15.[25] Indeed, the importance of the broadcaster's editorial opinion has long been acknowledged by the FCC itself, "the expert body which Congress has charged to carry out its legislative policy."

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[24]In particular, editorializing by noncommercial broadcasters would promote their value in providing "a diversity of educational, cultural, and public affairs programming that commercial stations had failed to furnish." Govt. Brief 15. Because the noncommercial station often serves a different audience than the commercial station, its editorials are likely to address issues that are of concern to its unique constituency, issues that may not be fully discussed over the commercial airwaves. *See* Brief of *Amicus Curiae* National Black Media Coalition, at 10-11. Section 399's restraint has therefore impeded noncommercial broadcasting's efforts to assume the role envisioned for it. As the Carnegie Commission concluded in its review of noncommercial broadcasting as it entered the 1980s:

> [T]here is one objective that public broadcasting must locate at its center of its activity if it is ever to be considered a mature voice in society. Public broadcasting must have a strong editorial purpose. *Without this strong editorial purpose expressed in diverse, even controversial ways, and without an ability to construct a context for understanding the events that occur around us and the meaning of history, public broadcasting will never be taken seriously.*

Carnegie II, at 29-30 (emphasis in original).

[25]The Government consistently attempts to mischaracterize responsible broadcast editorializing as the "exploitation" of station facilities "to propagate partisan ideological ends." *See, e.g.*, Govt. Brief 33-35. As explained more fully below, this misrepresentation of the noncommercial broadcaster's editorial opinion is wholly at odds with history, reality, FCC policy, and fundamental First Amendment values.

FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).[26] In its comprehensive review of editorializing by commercial and noncommercial broadcasters, the Commission concluded that "the expression of editorial opinions by broadcast station licensees on matters of public interest and controversy is consistent with their obligations to operate their stations in the public interest." *Editorializing Report, supra*, 13 F.C.C. at 1246. One Commissioner even noted that "governmental prohibition of editorialization by licensees . . . constitutes an unconstitutional abridgment of free speech." *Id.* at 1262 (separate views of Commissioner Jones). Therefore, for the past thirty-five years, the FCC has actively *encouraged* licensee editorializing.[27] In fact, while the Government was preparing its brief to this Court, the FCC was reiterating that "licensee editorializing should be encouraged and is no more subject to abuse than other controversial issue programming." *Notice of Proposed Rule*

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[26]This Court's decisions "have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). Consequently, it is significant that the FCC is only the nominal appellant in this lawsuit. The FCC informed the District Court that "no position is taken by the Commission on the constitutional question presented in this case," specifically noting that "[t]he arguments advanced [by the Justice Department] in defense of Congress' constitutional power to enact § 399 do not necessarily reflect the positions taken by the Commission in other areas of policy not mandated by § 399." Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment 1-2 n*.

[27]For example, in its 1960 *Programming Statement*, the Commission included "editorialization by licensees" as one of the fourteen "major elements usually necessary to meet the public interest, needs and desires of the community." 25 Fed. Reg. 7295. The FCC enforces this policy by taking the broadcaster's editorializing practices into account in license renewal proceedings. *E.g., Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 860 (D.C. Cir. 1970) ("There is a public interest in diversity in policy areas lit by the lantern of editorial probes."); *RKO General, Inc.*, 44 F.C.C.2d 149, 219 (1969) ("The [licensee's] policy of not presenting editorials runs squarely athwart Commission policy. The Commission assesses demerits for failure to editorialize."); *Miners Broadcasting Service, Inc.*, 20 F.C.C.2d 1061, 1061-62 (1970); *Evening Star Broadcasting Co.*, 27 F.C.C.2d 316, 332 (1971).

Making In re Repeal or Modification of the Personal Attack and Political Editorial Rules, F.C.C. Gen. Docket No. 83-484, at 17 (adopted May 12, 1983) ("*1983 Proposed Rulemaking*").

In sum, § 399 outlaws exactly that speech to which the First Amendment gives the greatest protection, for it not only abridges the licensee's right to express its views on important public issues — a freedom "indispensable to the discovery and spread of political truth" (*Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)) — but it also infringes upon "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion, supra*, 395 U.S. at 390. Section 399 stifles the noncommercial broadcaster's editorial voice not just on election day, but each and every day. Its constant and categorical prohibition cannot be reconciled with the guarantees of freedom of speech and the press.

2. The "Special Character" of Broadcasting Mandates the Maximization of the Number and Diversity of Editorial Viewpoints, Not Their Suppression.

There can be no doubt that broadcasting falls within the First Amendment's protection against governmental abridgment of freedom of speech and the press. *See, e.g. United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 133 (1973) ("*CBS v. DNC*") (Stewart, J., concurring) ("Private broadcasters are surely part of the press."). Television and radio are today the primary source of news and opinion for the majority of Americans. *1983 Yearbook* A-2. "In terms of the role of free speech in the functioning of a system of self-government, radio and television broadcasting have taken the place of the stump and the soap box in 1791." Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. L. & Econ. 15, 15 (1967).

To be sure, each medium of expression presents somewhat different First Amendment problems. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). But as the District Court expressly found, nothing in the "special character" of noncommercial broadcasting "justif[ies] the application of less stringent First Amendment standards in the present case." J.S. App. 10a-11a. In fact, this Court's decisions make clear that the government's "refusal to permit the broadcaster to carry a particular program or to publish his own views

. . . would raise . . . serious First Amendment issues." *Red Lion, supra*, 395 U.S. at 396.

The unifying principle in the area of broadcast regulation is that structural limitations of the medium (*e.g.*, spectrum scarcity) may justify restricting the rights of licensees in order to preserve the "paramount" rights of viewers and listeners. *Id.* at 390. But never has this Court suggested that such a rationale could sustain a regulation preventing the broadcaster from airing its own opinions. The First Amendment has always been invoked in the broadcasting context to *expand* the number and diversity of views expressed over the airwaves, not to *limit* the speakers and issues that may be discussed. *See id.* at 390-91; *CBS, Inc. v. FCC*, 453 U.S. 367, 395-96 (1981). The fairness doctrine regulations were upheld in *Red Lion* precisely because they were found to "enhance rather than abridge the freedoms of speech and press" by promoting "the First Amendment goal of producing an informed public capable of conducting its own affairs." 395 U.S. at 375, 392. Section 399's censorship of editorial opinion has exactly the opposite intent and effect.

Furthermore, even when this Court has upheld government regulation deemed necessary to "preserve an uninhibited marketplace of ideas" (*id.* at 390), it has always emphasized that "the broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties].' " *CBS, Inc. v. FCC, supra*, 453 U.S. at 395 (quoting *CBS v. DNC, supra*, 412 U.S. at 110). For example, in *Red Lion*, the Court specifically noted that there was "no question here" of "government censorship" or "refusal to permit the broadcaster . . . to publish his own views." 395 U.S. at 396. Similarly, in upholding a limited access requirement in *CBS, Inc. v. FCC, supra*, the Court stressed that it "does not impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming." 453 U.S. at 397. *Accord, CBS v. DNC, supra*, 412 U.S. at 121, 124 (obligation to accept editorial advertisements would be inconsistent with our system of "private, independent broadcast journalism" and would lead to "erosion of the journalistic discretion of broadcasters in the coverage of public issues"); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 n.14 (1979).

In sum, the Government's unsupported assertion that "this Court has sustained important restrictions upon the right of all broadcasters to editorialize" (Govt. Brief 31) could not be further from the truth. Rather, "[The First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States, supra,* 326 U.S. at 20. That objective is achieved by maximizing the number of voices heard over the air, not by silencing those who do have access to the microphone.[28]

B. There Are No Compelling Government Interests to Justify Section 399's Restraint on Free Expression.

Because the noncommercial broadcaster's editorial speech is entitled to the full panoply of First Amendment protections, the Government must show that § 399's ban on editorializing is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Carey v. Brown,* 447 U.S. 455, 461 (1980). "Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling,' . . . 'and the burden is on the government to show the existence of such an interest.' " *Bellotti, supra,* 435 U.S. at 786. The Government has offered two alternative justifications for the statute, but they are far from compelling.[29] Indeed, the structure

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[28]In any event, the "special character" of broadcasting cannot justify § 399, which prohibits editorial comment only by noncommercial licensees and does not apply to commercial broadcasters. "Certainly spectrum scarcity cannot be invoked to support a government attempt to penalize or suppress speech, based on its general content, by some, but not all, broadcast licensees; scarcity hardly serves as a convincing justification where only some licensees are subject to regulation." *Community-Service Broadcasting, supra,* 593 F.2d at 1111 n.21.

[29]The Government has apparently conceded that the concerns to which § 399 is allegedly addressed are not compelling. Having been unable to persuade the District Court that those asserted interests are compelling, the Government now argues that they are only "important." Govt. Brief 21, 34, 35, 39. Thus, if the Court agrees that the broadcaster's editorial opinions are entitled to traditional First Amendment protections, the decision below must be affirmed.

and legislative history of § 399 suggest that the statute was enacted not to further any compelling government interest, but to further an illegitimate congressional self-interest in suppressing potentially critical editorial comment.

1. The Articulated Congressional Desire to Suppress Critical Editorial Comment Is Not a Legitimate Government Interest.

The fundamental principle in First Amendment law is that the government has no legitimate interest in limiting the free flow of information. Thus, "when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' " *Consolidated Edison Co. v. Public Service Comm'n, supra,* 447 U.S. at 536 (quoting *Niemotko v. Maryland,* 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result)). *See Minneapolis Star & Tribune Co. v. Minnesota,* 103 S.Ct. 1365 (1983).[30]

Examination of the legislative history of § 399 in accordance with this directive reveals that the statute may well have been enacted for an illegitimate purpose, for the only rationale articulated by those considering the provision indicates that it was intended to prevent noncommercial broadcasters from being able to criticize congressional policies and officials, in their editorials. The editorializing ban was inserted by the House Committee "[o]ut of abundance of caution" (H.R. Rep. No. 572, 90th Cong., 1st Sess. 20 (1967)), despite the acknowledgment by its sponsor that "anyone who has had any experience in the past 6 years knows there has not been the slightest control of any kind exercised by the Federal Government in making grants . . . ." 113 Cong. Rec. 26407 (remarks of

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[30]This Court has been especially wary of any governmental interference in the editorial process, even when the intent behind legislation restricting freedom of the press appears benign. *See Miami Herald Publishing Co. v. Tornillo, supra,* 418 U.S. at 259 (White, J., concurring); *Mills v. Alabama, supra.*

Rep. Springer).[31] What there had been, however, were some Congressmen who were upset by noncommercial broadcasts that they viewed as potentially damaging politically. Certainly, Representative Springer was quite explicit about why he wanted to add § 399: he didn't like commercial broadcasters taking positions on candidates, and he wanted to "close this loophole" that could permit noncommercial stations to emulate their commercial counterparts. 113 Cong. Rec. 26387-88. Similar fears of criticism were voiced by his colleagues in the House.[32]

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[31]The House Committee Report incorrectly observed that "considerable testimony" had been heard that no educational stations editorialized. In fact, the Committee had heard from several witnesses who stated that noncommercial stations had editorialized in the past and thought it important that they continue to do so. *E.g.*, *House Hearings* at 404 (Utah Gov. Rampton); *id.* at 97 (HEW Secy. Gardner). The witnesses (including the NAEB president cited in the Govt. Brief at 24) did say that noncommercial broadcasters did not intend to involve themselves in partisan issues such as candidate elections. *See, e.g., id.* at 97, 513. It is odd, therefore, that the Government brief repeatedly refers to "partisan" "electioneering" as the evil to be feared, inasmuch as the licensees do not wish to engage in such activities and § 399's provision on candidate endorsements would fully protect against such concerns.

[32]*E.g.*, 113 Cong. Rec. 26391 (Rep. Keith: "It is conceivable that [a certain noncommercial television broadcast] could . . . have adversely affected my candidacy for re-election."); *id.* (Rep. Joelson: "Those of us in public office are in a position where newspapers, radio, or TV stations can say anything they wish about us. . . . Therefore, the right of editorializing should be very, very carefully scrutinized."); *id.* at 26399 (Rep. McClure: "Witnesses before the committee not only saw public television as a force for social good, but said it should and will crusade. Crusade for what? I suppose that by the time I have finished this speech, it might well be a crusade for my opponent in next year's election."); *id.* at 26389 (Rep. Devine: "I understand that there is one educational TV station out on the west coast that a bunch of 'hippies' are running. Someone has suggested that it would indeed be amazing to hear the type of analysis they are making. . . . This is one of the areas in which we have had to work very hard in order to try to provide some safeguards.").

Dean W. Coston, then Deputy Undersecretary of HEW and primary drafter of the original legislation, candidly acknowledged the motivation behind the addition of § 399:

Additional evidence that § 399 was not a response to legitimate concerns over the possible effects of federal funding stems from the fact that when enacted, and until its amendment fourteen years later in response to this lawsuit, the prohibition applied to hundreds of noncommercial broadcasters that received absolutely no federal aid. *See* note 19, *supra*. Contrary to the Government's contention, Congress was certainly aware that not all noncommercial broadcasters would be receiving CPB funds.[33] Furthermore, other provisions of the Act were directed not toward all noncommercial broadcasting stations, as was § 399, but only toward "each recipient of [CPB] assistance," thereby indicating both that Congress recognized that not all stations would be receiving CPB grants, and that it knew how to limit a restriction when it wanted to. *See, e.g.*, 47 U.S.C. § 396(1)(3)(A), as enacted, Pub. L. No. 90-129, 81 Stat. 365 (now § 396(1)(3)(C)) (recordkeeping and audit requirements for recipients of CPB grants).

It thus appears that § 399 was not the product of careful consideration of the imminent dangers posed by licensee editorializing (*cf.*

> I don't know where you are going to get good public policy editorializing if you can't get it at the public sector. You certainly aren't going to get it out of the commercial networks, nor do you get it out of very many local commercial stations. So I think that was a mistake, and I told Springer that I thought it was a mistake. I understand his point of view, and I understand his fears that this system could be used to unseat certain members of Congress.

J. Burke, An Historical-Analytical Study of the Legislative and Political Origins of the Public Broadcasting Act of 1967, at 209 (1972) (dissertation published by University Microfilms).

[33]For example, the Senate Report acknowledges that some 183 noncommercial television and 346 radio stations were then broadcasting (S. Rep. No. 222, 90th Cong., 1st Sess. 2-3 (1967)), yet CPB's annual reports clearly reflect that only a fraction of those stations were receiving grants. *See, e.g.*, CPB, *Public Broadcasting 1969*, at 17, 21 (of the more than 425 noncommercial radio stations, only 73 stations and 15 satellite stations qualified for support); CPB, *Developing a National Resource: Annual Report 1970* ("the limited resources of the Corporation prevent offering a support grant program to all radio licensees"). In fact, the first CPB grant to a station (either TV or radio) was not made until 1969, two years after the ban on editorializing was enacted. "Public Broadcasting: The First 10 Years," 8 CPB Reports No. 24, at 2 (1977).

Fullilove v. Klutznick, 448 U.S. 448, 549-52 (1980) (Stevens, J., dissenting)), but was instead a last-minute political compromise designed to win the support of reluctant Congressmen who may have feared potential criticism from noncommercial broadcasters. As one commentator concluded after reviewing the Act's legislative history: "[T]he purpose of Section 399 was clear: to prevent Congress from creating a monster that might someday turn on its creator. Therefore, to achieve its own self-protective ends Congress simply legislated away a significant part of educational broadcasters' right of free speech."[34]

2. The Interests Asserted by the Government Cannot Justify Section 399's Ban on Editorializing.

The Government does not contend that it would be permissible for Congress to have enacted § 399 in order to suppress potential criticism. Instead, the Government offers two contradictory justifications for the prohibition against editorializing, arguing on the one hand, that § 399 is needed to prevent the exploitation of noncommercial stations for the propagation of "private" and "partisan" viewpoints, and alternatively, that the statute is needed to prevent the propagation of "government" propaganda. These alleged concerns are entirely speculative, however, finding no support in the record or reality, and they cannot therefore justify § 399's wholesale abridgment of free speech. "Mere speculation of harm does not constitute a compelling state interest." *Consolidated Edison Co. v. Public Service Comm'n, supra*, 447 U.S. at 543.

a. *The Alleged Interest in Preventing CPB-Funded Stations From Propagating Their "Private" Viewpoints Is Neither Legitimate Nor Compelling.*

The first interest advanced by the Government is that § 399 is necessary to ensure that noncommercial stations not be exploited for the propagation of "private" and "partisan" viewpoints. Ac-

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[34]Toohey, *Section 399: The Constitution Giveth and Congress Taketh Away*, 6 Educ. Broadcasting Rev. 31, 34 (1972). The manifest unconstitutionality and troubling legislative history of § 399 have not escaped the attention of courts and other commentators. *See, e.g., Community-Service Broadcasting, supra*, 593 F.2d at 1128 n.25 (Robinson, J., concurring); Lindsey, *Public Broadcasting: Editorial Restraints and the First Amend-*

cording to this rationale, Congress supposedly intended to create and finance a "special broadcasting system" devoted to "public, not private, purposes." Permitting noncommercial broadcasters to editorialize, it is claimed, would seriously interfere with this "public mission," for the stations would become "inviting target[s] for capture by private interest groups" who would then use them "to propagate partisan ideological ends."[35] Not only is this purported justification based on pure speculation, but it wrongly assumes that government has a legitimate interest in prohibiting CPB-funded licensees from expressing their "private" views.

1. The Government's argument proceeds from the erroneous premise that because Congress "created" noncommercial broadcasting, it may therefore impose whatever restrictions it deems necessary to ensure that the stations remain true to their "public mission." But Congress did not "create" noncommercial broadcasting any more than it "created" commercial broadcasting. Noncommercial broadcasting existed before the government ever began to regulate the broadcast spectrum, and it endured and flourished for almost fifty years without a penny of federal aid. Even today, the federal contribution amounts to barely one-fifth of noncommercial broadcasting's income and is less than half the sum raised from

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ment, 28 Fed. Com. B.J. 63, 81 (1975); Note, *The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment*, 13 U. Mich. J. of Law Reform 541, 548-49 (1980).

[35]Govt. Brief 33-35. To the extent there was any meaningful consideration given to § 399, nothing articulated in the legislative history supports the proposition that the statute was thought necessary to prevent the propagation of "private" views with taxpayer funds. Rather, this argument appears to have been "fashioned" by Government attorneys seeking a legitimate justification for § 399. *See* Letter from Atty. Gen. Civiletti to Sen. Byrd, quoted in note 18, *supra*. A rationale that trails its implementing legislation cannot be deemed compelling. *See Talley v. California*, 362 U.S. 60, 64 (1960). Indeed, the Government apparently did not consider this alleged interest important enough to mention in attempting to defend the statute in the District Court. The failure to have raised this argument below is reason enough for this Court not to consider it (*see Dothard v. Rawlinson*, 433 U.S. 323 n.1 (1977)), but in light of Congress' failure to have mentioned it either, this purported rationale surely cannot justify § 399's ban on editorializing.

wholly private, non-governmental sources.[36]

More important, the fact that the federal government now helps to fund noncommercial broadcasting does not alter the essential character of the medium as "a system of private broadcasters licensed and regulated by Government" in which "broad journalistic discretion" in the discussion of public issues is left with the licensee. *CBS v. DNC, supra*, 412 U.S. at 116, 105 (opinion of Burger, C.J.); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 703 (1979). Noncommercial broadcasting is not a domestic Voice of America. Rather, it is simply a category comprising the over 1400 independently operated broadcasting stations that are licensed to nonprofit educational organizations.[37] The noncommercial broadcaster has as great a right to express its "private" viewpoints as its commercial counterpart has.

In fact, CPB grants to noncommercial broadcasters are but the tip of the iceberg of the federal government's subsidization of com-

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[36]CPB, *Public Broadcasting Income: FY 1982 (Preliminary)* (July 1983) (CPB expenditures accounted for 20.5% of noncommercial broadcasting's FY 1982 income; private sources supplied 40.9%). Moreover, only about half of CPB's contribution goes directly to noncommercial stations. *See* CPB, *Annual Report 1981*, at 7-8 (only $96.1 million of CPB's 1981 appropriation of $162 million was distributed in operating grants to stations). Some stations, like KSJN-AM in St. Paul, Minnesota, receive as little as $2,560 per year from CPB. *Id.* at 42.

The Government repeatedly attempts to overstate the federal contribution by misleadingly merging all federal, state, and local tax-based assistance into a single "government" category and citing only to those combined data. *See generally* Brief of *Amici Curiae* PBS and NAPTS, at 11-15.

[37]*See* 47 C.F.R. § 73.621. It bears repeating that *none* of these 1400 stations is owned or operated by the federal government. The majority of CPB recipients are private, community-based educational corporations. Most of the others are licensed either to private colleges and universities or to publicly supported educational institutions. *See* CPB, *1982 Public Broadcasting Directory*, at 18-50, 66-68 (in 1981, 319 (82%) of the 388 licensees receiving CPB grants were operated by private nonprofit educational foundations or institutions of higher learning). Even if the publicly supported stations could be considered "government-owned," despite their being operated by independent boards and commissions, there is no basis for attributing the local and state involvement to the federal government, as the Government's brief attempts to do.

municative activities in this country. Virtually every medium is infused with some form of direct or indirect support: Newspapers and periodicals receive substantial postal subsidies (*see Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976)); commercial broadcasters receive the value of their license (*see Community-Service Broadcasting, supra*, 593 F.2d at 1120 n.43); all media receive significant subsidies in tax benefits and sizeable revenues from government advertising.[38] Congress today funds everything from education to elections, from parks to playhouses. If the existence of such support were deemed sufficient to justify restricting the recipients' freedom of speech, the First Amendment would soon become meaningless.[39]

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[38] *See CBS v. DNC, supra*, 412 U.S. at 174 n.5 (Brennan, J., dissenting) (license represents government subsidization of broadcasting); *Gottfried v. FCC*, 655 F.2d 297, 312 & n.55 (D.C. Cir. 1981) (license is "a commodity of great value"), *rev'd on other grounds sub nom. Community Television of Southern California v. Gottfried*, 103 S.Ct. 885 (1983). *See generally* Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565, 624 n.279 (1980): "The limited funds granted to public broadcasting stations are paltry compared to the economic value of the spectrum given to many if not most commercial broadcasters." For example, a VHF station license recently sold for $220 million. *See* Govt. Brief 29 n.59. In contrast, the entire CPB appropriation for the preceding year was only $162 million. CPB, *Annual Report 1981*, at 4. The value of the federal postal subsidy is likewise enormous. *See Hannegan v. Esquire*, 327 U.S. 146, 151 n.7 (1946) (subsidy to Esquire Magazine estimated to be $500,000 a year in 1946). And the amount of federal money disbursed to the media through government advertising totalled over $189 million in 1981, almost twice the sum distributed directly to noncommercial stations by CPB. *Advertising Age*, Sept. 9, 1982, at 177.

[39] To take but one example of the far-reaching implications of appellant's argument, the Government specifically analogizes support for noncommercial broadcasting to that provided to many schools and universities, contending that for both enterprises, involvement in "partisan ideological controversies" would endanger the success of their mission. Govt. Brief 34-35. The Government obviously believes, therefore — and it follows from the illogic of its argument — that it could impose a restriction similar to § 399 on any university that received federal assistance (as virtually all do), prohibiting that school from expressing its institutional views on public issues. As a result, such institutions would be barred from offering their respected opinions to this Court as *amici curiae* in cases involving important

(footnote continued on following page)

Courts have therefore rejected any argument that government subsidization of expression provides a legitimate rationale for interfering with its content. For example, government efforts to limit the editorial discretion of state-subsidized publications have uniformly been rebuffed on First Amendment grounds.[40] This Court, too, has repeatedly held that even though the government may not have been obligated to create or support a forum for communication in the first instance, once it has chosen to do so, any restrictions imposed must conform to traditional First Amendment standards. *E.g., Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555-58 (1975).[41]

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issues, even those that might uniquely affect the schools themselves. *Cf., e.g., Bakke v. Regents of California*, 438 U.S. 265, 316-17 (1978) (opinion of Powell, J.) (referring with approval to minority recruitment program implemented by Harvard College and described in its *amicus curiae* brief).

It is ironic that *amicus curiae* Mobil Corporation argues that noncommercial broadcasters should not have the right to use tax dollars to express their views on public issues. The oil industry, of course, is one of the most heavily subsidized in this country; the oil depletion allowance alone has an estimated value of $3 *billion* in FY 1984. OMB, *Budget of the U.S. Government, FY 1984*, at 5-38. Yet as its participation in this case demonstrates, and as anyone who reads the local newspapers is aware, Mobil freely propagates its "private" views with the support of these taxpayer funds.

[40]*See, e.g., Gambino v. Fairfax County School Bd.*, 564 F.2d 157 (4th Cir. 1977), *aff'g per curiam*, 429 F.Supp. 731 (E.D. Va. 1978); *Schiff v. Williams*, 519 F.2d 257, 260-61 (5th Cir. 1975); *Bazaar v. Fortune*, 476 F.2d 570, 574 (5th Cir.), *aff'd as modified en banc*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973). The prohibition against content interference exists even where, unlike here, the government wholly funds an activity. *See, e.g., Antonelli v. Hammond*, 308 F.Supp. 1329, 1337 (D. Mass. 1970).

[41]As the Court of Appeals for the D.C. Circuit concluded in rejecting the very contention made by the Government in this case:

> [N]oncommercial licensees are fully protected by the First Amendment. Clearly, the existence of public support does not render the licensees vulnerable to interference by the federal government without regard to or restraint by the First Amendment.

Community-Service Broadcasting, supra, 593 F.2d at 1110.

Thus, there is no legitimate government interest in prohibiting noncommercial broadcasters from expressing their "private" views in order to preserve the medium for its intended "mission." In fact, as discussed above, the licensee's expression of its "private" editorial opinions is perfectly compatible with its intended societal function. Nor is there any legitimacy to the assertion that subsidizing the noncommercial licensee's editorial speech could lead to constitutional problems.[42] As this Court held in *Buckley v. Valeo, supra,* when financial assistance is provided not to abridge, but to facilitate the exercise of free speech, the funding of private political views does not violate the First Amendment rights of taxpayers who might disagree with those views. *See* 424 U.S. at 90-93. Indeed, *Buckley* specifically adverted to the subsidization of noncommercial broadcasting as an example of an attempt to enhance First Amendment values by promoting "a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive." *Id.* at 93 n.127 (citation omitted).[43]

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[42]Since § 399 prohibits noncommercial stations from editorializing even with nongovernmental funds, the Government's attempt to justify the statute as necessary to guard against the use of public funds to pay for the licensee's expression of its "private" views can readily be dismissed. *See also* pp. 45-47, *infra*. More fundamentally, *all* views expressed on broadcast stations are "private." A licensee can do nothing but air an aggregate of "private" voices, and if taxpayers' dollars help fund the broadcasting entity, they inevitably aid in the expression of those "private" views. The voice of the licensee itself, then, is but one of many such voices, and there is no justification under this rationale for singling it out for exclusion.

[43]The Government's reliance on *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), is misplaced, for that case held only that an individual could not be required "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235. It is quite different to assert that the government may not support an endeavor with which some taxpayers may disagree. As this Court noted in *Buckley v. Valeo, supra,* every Congressional appropriation uses public money in a manner to which some taxpayers object. 424 U.S. at 90-92. Furthermore, it is a giant leap from the remedy applied in *Abood,* which did not infringe on anyone's right of free expression, to § 399's suppression of the broadcaster's editorial opinions. *See Bellotti, supra,* 435 U.S. at 794 n.34.

2. In addition, there is no basis for believing that if noncommercial stations were permitted to editorialize, they would be used for the propagation of "partisan ideological ends." Noncommercial broadcasters had been on the air for nearly fifty years before § 399 was enacted, without a single recorded instance of a station being "captured" by private, ideological interests. For at least forty of those years, noncommercial broadcasters had been allowed to editorialize, and since 1962, they had been receiving federal funds while doing so — all without any hint of a station's exploitation for partisan ends. And there was no reason to think that an increase in federal aid to noncommercial broadcasting would somehow suddenly change things. In short, the alleged fear that permitting noncommercial broadcasters to express their "private" opinions would lead to the propagation of "partisan ideological ends" is simply made out of whole cloth. *Cf. Bellotti, supra*, 435 U.S. at 789 ("If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, . . . these arguments would merit our consideration. . . . But there has been no [such] showing") (citation omitted).[44]

Further, even were it inclined to do so, a noncommercial broadcaster could not use its station to propagate its own narrow viewpoint. The Government conveniently ignores any mention of the

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[44]Ironically, noncommercial licensees are uniquely accountable to public, rather than private, interests, and are the least likely to be "captured" by narrow, private-interest groups. Not only must they serve the "public interest, convenience, and necessity" as a condition of obtaining and retaining their license (47 U.S.C. § 309), but they must satisfy additional requirements designed to promote public accountability. For example, noncommercial stations not affiliated with governmental entities must establish and consult with "community advisory boards" that review their programming policies to ensure that the diverse needs and interests of the community are being represented. 47 U.S.C. § 396(k)(9). Moreover, unlike commercial broadcasters, noncommercial licensees are by the very nature of their ownership ultimately responsible to some entity that represents the public. And because noncommercial broadcasters depend so heavily upon the public for financial assistance and volunteer services, they are not likely to alienate that public support by using the stations to pursue their own ideological ends.

fairness doctrine, which — applicable to commercial and noncommercial stations alike (*see Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 295 (D.C. Cir. 1975)) — mandates a balanced and fair presentation of all controversial issues, thereby ensuring that the broadcaster cannot present only one side of any issue. *See Red Lion, supra*, 395 U.S. at 379-86; *Editorializing Report, supra*, 13 F.C.C. at 1252-53.[45] Thus, the fear of noncommercial broadcasting stations being used for the propagation of the partisan ideological ends of its management is entirely speculative, and § 399's prohibition against editorializing cannot be justified under this rationale. *See McDaniel v. Paty*, 435 U.S. 618, 628 (1978).

b. *The Alleged Interest in Preventing CPB-Funded Stations From Becoming Government Propaganda Organs Is Far From Compelling.*

The second interest asserted by the Government is that § 399 is necessary to prevent noncommercial broadcasting from becoming a vehicle for the dissemination of government propaganda. If CPB-funded stations were permitted to editorialize, the argument goes, it would be impossible to prevent political considerations from influencing the distribution of federal aid, and the broadcasters would inevitably air editorials favorable to those who hold the purse strings. Govt. Brief 35-39. As the District Court concluded (J.S. App. 12a-15a), however, this purported justification is also entirely speculative and unfounded. *See United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Williams v. Rhodes*, 393 U.S. 23 (1968).

Certainly nothing in the record before Congress gave anyone reason to fear that noncommercial broadcasters would suddenly become subject to government control simply because they were now to receive more federal assistance. As the sponsor of § 399 admitted, the government had been funding noncommercial stations for several years and there had been no hint of either favoritism in the distribution of those grants or interference with the broadcaster's

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[45]The Government also fails to mention that the "other" provision of § 399, which is not being challenged in this case, prevents the noncommercial broadcaster from injecting itself into partisan controversies and elections.

programming. 113 Cong. Rec. 26407 (remarks of Rep. Springer). If anything, the additional safeguards built into the Public Broadcasting Act made the possibility of government manipulation even more remote, for under its elaborate dual-level funding system, there is simply no way that a station's editorial policies can affect either its eligibility for, or the amount of, a CPB grant; a station would receive the exact same grant whether it praised or criticized the "government" in its editorials.

Any assertion that noncommercial broadcasting would respond to government pressure by biasing its editorials and converting itself into "a giant, government-controlled propaganda machine" must likewise be dismissed as "necessarily wholly speculative." *Buckley v. Valeo, supra,* 424 U.S. at 93 n.126 (rejecting contention that political parties receiving federal funds would be susceptible to government influence). There is surely no historical support for the Government's argument; there have never been any charges that noncommercial broadcasting has adopted a "pro-government" slant to its programming (*see* M. Yudof, *When Government Speaks* 124-35 (1983)), and the diverse and pluralistic nature of noncommercial broadcasters makes it virtually inconceivable that they would speak with one voice on any issue, much less with the voice of the federal government. *Id.* at 129-30. *See generally* Brief of *Amici Curiae* PBS and NAPTS at 19-21. *Cf. Bellotti, supra,* 435 U.S. at 785 n.22 ("We know of no documentation of the notion that corporations are likely to share a monolithic view on an issue such as the adoption of a graduated personal income tax.")[46]

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[46]The Government argues for the first time on this appeal — and without any support in the legislative history — that § 399 was also prompted by congressional concern over possible interference by state and local governments in the programming of their affiliated licensees. Even if this were a concern, it could not justify restricting the speech of the over 200 CPB-funded stations, including appellee Pacifica, that are privately owned and operated, with no connection to governmental entities. Moreover, there is no reason why the editorializing ban should be tied to the presence of CPB funding if the perceived danger is the potential for manipulation by state and local governments.

In addition, the suggestion that the *federal* government can silence the voice of a state- or local-affiliated broadcaster under this rationale is very

Moreover, the alleged fear that a station would attempt to curry favor with the government by biasing its editorial opinions makes no intuitive sense. For who is the "government"? And what is the "pro-government" position? Is it the Administration's? the Senate's? the FCC's? These different governmental actors and entities will often disagree — indeed that disagreement is almost by definition what identifies an issue as appropriate for editorial comment — leaving the broadcaster who wants to please the "government" with no clear choice. The safest option for the broadcaster seeking to curry favor, then, is simply not to editorialize at all, so as not to offend anyone.

Finally, as the District Court noted, there is another safeguard that demonstrates the utter fallacy of the Government's argument. The fairness doctrine and its specific manifestations in the personal attack and political editorializing rules require the licensee to provide a fair and balanced presentation of differing viewpoints, without regard to its own particular opinions. Thus even if the station presents a "pro-government" editorial, the opposing viewpoint will be heard, as well. In sum, the District Court was manifestly correct in concluding that the hypothetical fear of noncommercial broadcasting stations becoming government propaganda organs was entirely too speculative to justify § 399's prohibition against editorializing.[47]

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troubling. Surely, state and local governments retain the right to communicate their opinions on important public issues. A state "may seek to disseminate information so as to enable its citizens to make better informed decisions." *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975). As long as the government does not monopolize the airwaves, there is no constitutional justification for prohibiting the expression of its views. *See* T. Emerson, *The System of Freedom of Expression* 651 (1970); Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 Texas L. Rev. 1123, 1127 (1974). Particularly where the local governmental entity may wish to express its opposition to the policies of the federal government, serious federalism concerns are raised by the latter's suppression of the former's right to editorialize. *See, e.g., EEOC v. Wyoming*, 103 S.Ct. 1054, 1060-61 (1983).

[47]The Government suggests that the District Court erred in not deferring to Congress' judgment in this regard. However, where fundamental free speech and press rights are infringed, courts have always conducted their own exacting scrutiny of the asserted justifications and have imposed a

(footnote continued on following page)

C. Section 399's Ban on Editorializing Is an Irrational and Impermissible Response to Its Purported Objectives.

Even if there were some reason to fear that CPB-funded noncommercial stations would propagate their own private views or those of the "government" — and even if there were some legitimate government interest in preventing those views from being expressed[48] — § 399 still could not survive even the most minimal First Amendment scrutiny, for there is " 'no substantially relevant correlation between the governmental interest asserted and the [Government's] effort' to prohibit appell[ees] from speaking." *Bellotti, supra*, 435 U.S. at 795 (quoting *Shelton v. Tucker*, 364 U.S. 479, 485 (1960)). If the prohibition on editorializing is truly aimed at preventing the propagation of "private, partisan" viewpoints or preventing noncommercial stations from becoming propaganda organs, § 399 is not even rationally related to that end, much less is it "a precisely drawn means" of achieving that objective. *Consolidated Edison Co. v. Public Service Comm'n, supra*, 447 U.S. at 540.

1. On the one hand, § 399 broadly prohibits editorializing on all issues, not just those expressing partisan or "pro-government"

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heavy burden on the government to demonstrate the substantiality and immediacy of the alleged harm. *Cf. New York Times Co. v. United States*, 403 U.S. 713, 730 (Stewart, J., concurring); *id.* at 732 (White, J., concurring). As this Court has admonished:

> Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978). *Accord, Metromedia, Inc. v. City of San Diego, supra*, 453 U.S. at 519.

[48]Even if the Government were correct that Congress had enacted § 399 to ensure that stations not air "pro-government" editorials, the editorializing prohibition would be no less illegitimate. Congress would still be suppressing speech based on the speaker's viewpoint. Congress cannot constitutionally bar stations from expressing their sincerely held beliefs that the policies of the "government" are appropriate any more than it could prohibit them from expressing "anti-government" sentiments.

opinions.[49] The statute thus prevents the noncommercial broadcaster from contributing to the public debate on the numerous issues of interest to its community that neither have a partisan component nor bear any relation to the federal government. For example, what is the partisan perspective on child abuse? Is advocating a crackdown on uninsured drivers a "pro-government" or "anti-government" issue? The subjects that are of the greatest concern to the communities served by local stations are for the most part themselves purely local, cutting across partisan lines and having little connection to the federal government.[50] Section 399 thus impermissibly sweeps within its ambit clearly protected speech that poses no danger to the purported government interests. "Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must

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[49]The overbreadth of § 399 is but one way in which this statute differs from the Hatch Act's limitation on the political activities of federal employees, and any attempt to draw support for § 399 by analogy to that statute is misplaced. *See* 5 U.S.C. §§ 7324 *et seq.*; *Civil Service Comm'n v. National Assoc. of Letter Carriers*, 413 U.S. 548 (1973). Whereas § 399 broadly suppresses all editorial expression, the Hatch Act narrowly proscribes only "plainly identifiable acts of political management and political campaigning" (*id.* at 567), explicitly preserving the employee's right "to express his opinion on political subjects and candidates." *Id.* at 576. *See* 5 U.S.C. § 7324(b). In addition, the Hatch Act only covers government employees; noncommercial stations are independent entities. Finally, in upholding the Hatch Act, the Court emphasized that Congress imposed those restrictions only after more than a century of experience and experimentation with less restrictive alternatives had conclusively demonstrated that they were needed to maintain the effective operation of government and to preserve the sanctity of the electoral process. 413 U.S. at 564. In contrast, no such compelling interests or historical experience justify § 399's suppression of protected speech.

[50]A compilation of topics addressed in the editorials and replies appearing on television station KNXT in Los Angeles during a random four-week period in August, 1983 is set out in Appendix B. Only one of the eighteen editorials had any relation to the federal government (and it certainly was not "pro-government"), and it would be difficult to identify a partisan interest in many of the issues that were discussed. This finding is corroborated by research surveying nationwide editorial practices. *See, e.g.*, Fang & Whelan, *Survey of Television Editorials and Ombudsman Segments*, 17 J. Broadcasting 363 (1973).

be the touchstone." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

On the other hand, if § 399 was really intended to prevent non-commercial stations from propagandizing on behalf of their own or the "government's" viewpoint, it "provides only ineffective or remote support for the government's purpose." *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 564 (1980). For example, § 399 outlaws only the licensee's *editorial* speech and imposes no restrictions on any other aspect of the broadcaster's public affairs programming. Yet, as the FCC acknowledged over thirty years ago in specifically rejecting the very argument now being proffered by the Government in its name, the broadcaster that is determined to propagate a particular viewpoint can readily do so through myriad other programming formats.[51] As Congress was well aware when it enacted § 399, these formats could much more easily be abused to advocate subtly a particular editorial position.[52] Editorials, in fact, would be the least effective vehicle for propagandizing: An editorial is the most forthright expression of a station's position; it must be clearly labelled as such; and it triggers most directly the obligation to present contrasting viewpoints under the fairness doctrine. Indeed, the FCC has held that expression of the licensee's opinion may "be actually helpful in providing and maintaining a climate of fairness and equal opportunity for the expression of contrary views. Certainly the public has less to fear from the open partisan than from the

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[51] It is clear that the licensee's authority to determine the specific programs to be broadcast over his station gives him an opportunity . . . to insure that his personal viewpoint on any particular issue is presented in his station's broadcasts, whether or not these views are expressly identified with the licensee.

Editorializing Report, supra, 13 F.C.C. at 1252. In fact, it was in part the recognition of this very point that led the FCC to reject a prohibition against editorializing and to adopt the fairness doctrine as the means of ensuring the balanced presentation of differing viewpoints on public issues. *Id.* at 1252-53.

[52] In the House debate, for example, Rep. Watson explained:

Let them go ahead and editorialize. Give me the right to control program content, and others can editorialize all they want to, but I will influence the thinking of the American public more with the programs or with people I have appearing on the programs.

113 Cong. Rec. 26392. *Accord, id.* at 26408-09 (remarks of Rep. Brown).

covert propagandist." *Editorializing Report, supra*, 13 F.C.C. at 1254; *accord, 1983 Proposed Rulemaking* 17-18.

Moreover, the fact that § 399 has been interpreted to prohibit "only" the views of "licensees, their management or those speaking on their behalf" (*see In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973))[53] merely highlights the irrationality of the statute, for it means that *the very same opinions* that cannot be expressed by the licensee could be broadcast if they were mouthed by a station commentator, by a guest being interviewed, or by a person who simply walks in off the street. In fact, since the licensee retains the discretion to select whomever it wishes to speak on its station, the ban on licensee editorializing accomplishes nothing at all — except to suppress the one voice that most rightfully should be heard. *Cf. Buckley v. Valeo, supra*, 424 U.S. at 45 (limiting interpretation of statute only undermines its effectiveness); *Bellotti, supra*, 435 U.S. at 793 (prohibition's underinclusiveness undermines plausibility of state's purported interest); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 110 (1977) (Rehnquist, J., concurring) (statute's failure largely to achieve its purpose makes it difficult to

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[53]The Government argues that this limiting interpretation means that § 399 "interferes only minimally" with freedom of speech, because it does not prevent a licensee from expressing its views in any other medium and because others are free to state their opinions on the station's facilities. But it has long been settled that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). *Accord, Spence v. Washington*, 418 U.S. 405, 411 & n.4 (1974). And as Justice Blackmun cogently observed last Term, "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Regan v. Taxation With Representation*, 103 S.Ct. 1997, 2005 (1983) (Blackmun, J., concurring). More important, the First Amendment prohibits the minor, as well as the major, abridgment of its precious freedoms. *Thomas v. Collins*, 323 U.S. 516, 543 (1945) ("The restraint is not small when it is considered what was restrained."); *Near v. Minnesota*, 283 U.S. 697, 721 (1931); *N.L.R.B. v. Fruit and Veg. Packers and Warehousemen*, 377 U.S. 58, 80 (1964) (Black, J., concurring) ("First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop.").

take asserted state interest seriously).[54]

Likewise, § 399 restricts only the CPB-funded noncommercial broadcaster, even though the opportunity for government interference is just as great, if not greater, with respect to any of the other communicative activities subsidized by the federal government. Even in the broadcast medium, CPB funding is not the touchstone by which the potential for government control should be measured. For example, the threat of license nonrenewal (which hangs over commercial and noncommercial stations alike) and the host of subtle, yet powerful, "raised eyebrow" regulation practices, would provide a much stronger, less visible — and hence more dangerous — wedge for exerting leverage over editorial content than does the often minimal amount of direct CPB assistance.[55]

In short, the Government's argument proves too much and its statute addresses too little. Even if there were some basis for the Government's purported fears, § 399's ban on editorializing by noncommercial licensees "does not provide an answer that sufficiently relates to the elimination of those dangers." *Buckley v. Valeo*, *supra*, 424 U.S. at 45; *accord*, *Carey v. Brown*, *supra*, 447 U.S. at 465 (apparent overinclusiveness and underinclusiveness of restriction undermines asserted state interest). Indeed, this Court's statement in *Bellotti*, *supra*, 435 U.S. at 793, is just as applicable here: "The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a

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[54]The perversity of § 399 is that under the guise of preventing the propagation of "private" viewpoints, the one entity that is most responsive and responsible to the "public interest" is the only entity that cannot express its opinions over the noncommercial station. Nor can the selective exclusion of the licensee's viewpoint be justified on the ground that its opinion might prove more persuasive than others aired over its facilities. *See Bellotti*, *supra*, 435 U.S. at 790-91 ("the fact that advocacy may persuade the electorate is hardly a reason to suppress it").

[55]*See*, *e.g.*, *Community-Service Broadcasting*, *supra*, 593 F.2d at 1115-16; *Writers Guild v. FCC*, 423 F.Supp. 1064, 1146 (C.D. Cal. 1976), *vacated on jurisdictional grounds*, 609 F.2d 355 (9th Cir. 1976). Because commercial broadcasters have much greater market shares, the government would also have more incentive to influence their programming than that of the less popular noncommercial stations. *See* M. Yudof, *When Government Speaks*, *supra*, at 125-26.

genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject."

2. Finally, § 399's means of addressing the purported fears of broadcaster partisanship and government propagandizing is fundamentally at odds with the First Amendment. The statute suppresses the licensee's views in advance of their expression, allegedly in order to eliminate any possibility that the "privilege" of broadcasting might be abused. But the First Amendment does not permit the Government to restrain speech out of fear of its potential adverse consequences. *See generally Near v. Minnesota*, 283 U.S. 697 (1931). If ever a noncommercial broadcasting station were to ignore its fairness doctrine obligations and use its facility to propagate a particular partisan or "pro-government" viewpoint, then that would be the time to take remedial action, including, if necessary, revocation of its license. The Government may not, however, prohibit the broadcaster from speaking merely in *anticipation* of any such remote occurrence. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976); *Bellotti, supra*, 435 U.S. at 791-92.

In particular, to permit the government to silence the broadcaster in order to prevent the hypothetical possibility of government interference stands the First Amendment on its head. That Amendment is premised on the principle that freedom of speech and a free press are the most valuable defenses against government excesses; government suppression of speech is precisely the evil to be feared, not the remedy to be applied. "Any other accommodation — any other system that would supplant private control of the press with the heavy hand of government intrusion — would make the government the censor of what the people may read and know." *Miami Herald Publishing Co. v. Tornillo, supra*, 418 U.S. at 260 (White, J., concurring). *Accord, CBS v. DNC, supra*, 412 U.S. at 124-25.

Thus, the constitutionally permissible response to any fear that the government's or the licensee's views might dominate the airwaves is not to close down the broadcaster's editorial room, but, as the fairness doctrine already requires, "to push the doors open

to all viewpoints." *Community-Service Broadcasting, supra*, 593 F.2d at 1134 n.62 (Robinson, J., concurring). More speech, not less speech, is the way of the First Amendment. *See, e.g., Bellotti, supra*, 435 U.S. at 790-91; *Red Lion, supra*, 395 U.S. at 390; *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). If existing measures are deemed insufficient, the answer lies in tightening the safeguards against government interference and vigilantly enforcing the fairness doctrine, not in suppressing the broadcasters' views. "Freedom of the press cannot be preserved, as Mr. Justice Frankfurter noted, by prohibitions calculated 'to burn the house to roast the pig.' *Butler v. Michigan*, 352 U.S. 380, 383 (1957)." *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973). As the appellant FCC itself concluded in rejecting a call for a prohibition on licensee editorializing:

> Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views, or the forcefulness with which the view is expressed, but by making the microphone available, for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation.

Editorializing Report, supra, 13 F.C.C. at 1253-54.

II. SECTION 399'S DISCRIMINATORY SUPPRESSION OF THE CPB-FUNDED BROADCASTER'S EDITORIAL OPINIONS VIOLATES THE EQUAL PROTECTION GUARANTEES OF THE FIRST AND FIFTH AMENDMENTS.

Because § 399 discriminates with respect to the speech it permits in the same medium of expression, the Equal Protection component of the First and Fifth Amendments "mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown, supra*, 447 U.S. at 461-62; *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 98-99, 101 (1972). In particular, when the Government selectively prohibits one category of speech or class of speaker, it bears a heavy burden of justifying those exclusions. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Bellotti, supra*, 435 U.S. at 784-85.

Section 399 violates this fundamental principle of equality. The statute applies to only one type of broadcasting station; it restricts the free expression of only one speaker on that station; and it prohibits speech in only one form and on only one subject. Yet none of these discriminations can be shown to be even reasonably related to the purported government interests behind the ban on editorializing.

For example, communications media that receive federal subsidies other than CPB grants are permitted to editorialize, even though they are no less susceptible to government influence and no less likely to espouse "private" viewpoints. *See Community-Service Broadcasting v. FCC, supra*, 593 F.2d at 1123 n.52. Noncommercial stations that receive no CPB monies often receive discretionary funding from diverse federal entities such as the National Endowment for the Arts or the Departments of Commerce and Education;[56] commercial broadcasters receive federal subsidies in other forms, including their valuable license at no cost; the print media are likewise heavily subsidized through reduced postal rates and tax exemptions; more generally, the federal government subsidizes individuals and organizations ranging from universities to oil companies; yet only the CPB-funded broadcasters (whose grants pass through an elaborate mechanism precisely to ensure their insulation from government interference) are prohibited from expressing their own views.

Section 399's restraint of speech is even less defensible when the exact scope of the restriction is examined, for it prohibits only editorials presented on behalf of the station management. Opinions may be voiced by anyone else, even though such persons are no less likely to express "private" viewpoints or to espouse "pro-government" positions, particularly since the licensee retains the authority to decide whom to let on the air. Similarly, the statute bans only editorials and does not address the multitude of other

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[56]*See* CPB, *Inventory of Federal Funds Distributed to Public Telecommunications Entities, FY 1981* (June 1983) ($32 million distributed directly to noncommercial licensees through twenty different federal programs). Much of this money — such as NTIA's new facilities' construction grants — went to stations that did not receive CPB grants. *See Community-Service Broadcasting v. FCC, supra*, 593 F.2d at 1120 & n.42; *Carnegie II*, at 122.

programming formats, such as news commentary, interviews, and documentaries, that would be at least as attractive as vehicles for propagandizing or propagating partisan views. As the FCC itself has explained, the licensee editorials prohibited by § 399 are "just one of several types of presentation of public issues" and are not "intrinsically more or less subject to abuse than any other program devoted to public issues." *Editorializing Report, supra*, 13 F.C.C. at 1253.

Moreover, § 399 bars *all* editorial expression by *all* CPB-funded stations, including those editorials concerning purely local or non-governmental issues for which it would be impossible even to identify a partisan or federal interest. The denial of First Amendment rights cannot be founded upon the presumption of partiality and vulnerability to government influence that underlies § 399. *See Police Dept. of Chicago v. Mosley, supra*, 408 U.S. at 100-01 (selective prohibition of nonlabor picketing held unconstitutional because government may not distinguish among speakers and subject matters "on such a wholesale and categorical basis"); *McDaniel v. Paty, supra*, 435 U.S. at 645 (White, J., concurring).

In sum, § 399 lacks the precision of regulation mandated by the First Amendment and the Equal Protection Clause. In only one selective context — that of overt editorializing by CPB-funded noncommercial broadcasters — is the existence of a partial federal subsidy deemed to necessitate the abridgment of freedom of speech and the press. And within that context, no effort is made at individualized inquiry, with the result that speech posing absolutely no danger to the asserted government interests is subject to § 399's overbroad prohibitions. Under the Equal Protection guarantee, then, § 399 cannot stand.

III. SECTION 399 UNCONSTITUTIONALLY CONDITIONS THE RECEIPT OF A CPB GRANT ON THE BROADCASTER'S FORFEITURE OF ITS FIRST AMENDMENT RIGHTS.

Section 399 also violates the principle that the government may not condition the receipt of a public benefit on the relinquishment of constitutional rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 518 (1958); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926). While the government may be under no obligation to provide a benefit in the first place, "[i]t is too late in the day to doubt that

the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Because § 399 requires the noncommercial licensee to forfeit its right to editorialize with its own funds in order to receive a CPB grant, "[o]nly the gravest abuses, endangering paramount interests," can justify the statute's infringement upon the station's exercise of its First Amendment liberties. *Id.* at 406 (quoting *Thomas v. Collins*, *supra*, 323 U.S. at 530).

That § 399 places a condition on the receipt of a CPB grant cannot be denied. All commercial broadcasters, and all noncommercial broadcasters that do not receive grants from CPB, are free to speak out on issues of public importance. But in distributing financial aid to noncommercial stations through CPB grants, the Government has placed the noncommercial broadcaster in the position of having to choose between retaining its right to editorialize (as it did before § 399 was enacted) or receiving federal aid; it cannot do both. "In reality, the [grantee] is given no choice, except a choice between the rock and the whirlpool, — an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." *Frost & Frost Trucking Co. v. Railroad Comm'n*, *supra*, 271 U.S. at 593.[57]

This Court has repeatedly condemned any such governmental attempt to use the power of its purse to "produce a result which [it] could not command directly." *Speiser v. Randall*, *supra*, 357 U.S. at 526. For example, in *Sherbert v. Verner*, *supra*, the Court invalidated an unemployment insurance law that required recipients to work in violation of their religious convictions, holding that the

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[57]The alarming implications of such a coercive use of governmental largesse in subsidizing the communications media were recognized in *Hannegan v. Esquire*, *supra*, 327 U.S. at 155-56 (citations omitted):

> We may assume that Congress . . . need not open second-class mail to publications of all types. . . . But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. . . . Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated.

State could not force an applicant "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404. *Accord, Speiser v. Randall, supra* (tax exemption conditioned on signing loyalty oath); *McDaniel v. Paty, supra* (holding of public office conditioned on surrendering ministry).[58] Here, too, the noncommercial broadcaster must abandon a central element of its First Amendment rights in order to receive the governmental benefit.

The Government relies upon the recent decision in *Regan v. Taxation With Representation*, 103 S.Ct. 1997 (1983) ("*TWR*"), to claim that § 399 does not abridge the noncommercial broadcasters' free speech, but merely provides that the federal government will not subsidize their editorials. Far from supporting the Government's contention, however, *TWR* only confirms the constitutional defects of § 399.

In upholding a limitation on "substantial" lobbying by tax-exempt organizations, the Court in *TWR* specifically noted that under the dual provisions of § 501(c)(3) and § 501(c)(4) of the Internal Revenue Code, any organization could segregate its lobbying activities from its nonlobbying activities by establishing two parallel operations (one under each of the two Code provisions), and by

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[58] *McDaniel v. Paty, supra*, is particularly apposite, for the State argued there that its prohibition on clergy holding public office was necessary to protect against the possibility that clergymen would unduly promote their sectarian interests. Finding no persuasive support for the fear that clergymen would be unfaithful to their public duties, this Court rejected the asserted rationale and held that the clergy-disqualification provision unconstitutionally conditioned the right to seek office on surrender of the right to be a minister. As Justice Brennan stated in concurrence:

> [G]overnment may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved with religion. . . . The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas.

435 U.S. at 641-42. Similarly, the antidote which the Constitution provides against broadcast licensees who may espouse "private" or "pro-government" viewpoints is to subject their ideas to refutation in the marketplace.

doing so, could both lobby and receive the full benefits of tax deductibility for its nonlobbying activities. In other words, the Court explained, Congress had not forced the organization to forfeit its right to lobby in order to qualify as tax-exempt, but had merely chosen not to pay for its lobbying activities out of public monies.[59] As the three concurring Justices pointed out, the availability of the § 501(c)(4) affiliate option is critical to the decision in *TWR*, for it enables the charitable organization simultaneously both to lobby and to receive the government subsidy to which it is entitled for its nonlobbying activities. *Id.* at 2004-05 (Blackmun, J., concurring). No such option exists for the noncommercial broadcaster under § 399.

Section 399 simply does not fit the mold of *TWR*, since it does not merely provide that Congress will not pay for the noncommercial broadcasters' editorializing, but instead prohibits them from editorializing even with their own private funds. *Cf. id.* at 2001 n.7 (distinguishing *CARC v. Berkeley*, *supra*, because the ordinance invalidated in that case had unconstitutionally limited individuals' expenditure *of their own money* on political speech). In contrast to the Internal Revenue Code, § 399 does not permit a noncommercial station to editorialize with its own funds while still receiving government subsidies to support its non-editorializing activities.[60]

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[59]The Court analogized the situation in *TWR* to that in *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980), where it had explained that the government's refusal to provide Medicaid benefits to fund abortions was permissible, but an attempt to withhold *all* Medicaid benefits from an otherwise eligible candidate simply because she had exercised her right to have an abortion would be impermissible. *See* 103 S.Ct. at 2003; *id.* at 2004 n.* (Blackmun, J., concurring). Section 399 does precisely what the Court in *Harris v. McRae* said would be unconstitutional: It would withhold all CPB grants from an otherwise eligible station simply because that station wished to exercise its right to editorialize.

[60]In fact, the instant case presents just the situation that the concurring Justices emphasized would be unconstitutional under *Speiser v. Randall*, *supra*, and *Perry v. Sindermann*, *supra* — where a statute "does not merely deny a subsidy for [exercising a constitutional right]," but "deprives an otherwise eligible organization of [a subsidy] for all its activities, whenever one of those activities is [exercising the constitutional right]." *See* 103 S.Ct. at 2004 (Blackmun, J., concurring). The Government's attempt to draw support from the concurring opinion in *TWR* is laughable. The suggestion that § 399 is nevertheless valid because Pacifica would be free to

(footnote continued on following page)

Indeed, the fact that Congress did not establish or approve any mechanism by which CPB-funded noncommercial broadcasters could continue to editorialize with nonfederal money lays bare the fallacy of the Government's contention that § 399 was enacted simply to ensure that the government does not pay for the stations' editorializing. If that had been its intent, Congress could easily have specified, as it does in myriad other contexts, that no portion of a CPB grant may be used to support that particular activity (*i.e.*, editorializing). *See id.* at 2002 (Congress could validly grant funds on condition that none of the money be used for lobbying); 18 U.S.C. § 1913. *See generally* Brief of *Amicus Curiae* ACLU at 23. In fact, CPB itself imposes such activity-specific limitations on its grants, and noncommercial stations maintain separate accounts in order to segregate the restricted funds they receive, not only from CPB but from a variety of different sources. *See generally* CPB, *Public Telecommunications Audit Guide and Requirements* (June 1980).

Nor is it without significance that § 399 is phrased as an express prohibition against editorializing by a CPB-funded noncommercial station, and that the penalty for its violation is not the withdrawal or repayment of the federal assistance, but direct sanctions against the station potentially leading to revocation of its license and imposition of criminal penalties.[61] This, too, undermines the plausi-

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editorialize on any unsubsidized station while continuing to operate a subsidized one is as ridiculous as asserting that the San Francisco Examiner could be prohibited from editorializing because its parent, the Hearst Corporation, can express its views in its Los Angeles paper, the Herald Examiner. And it would hardly comfort the readers in San Francisco to know that the residents of Los Angeles were receiving a full range of editorial viewpoints.

[61]The contrast between § 399's ban on all editorializing and § 501(c)(3)'s prohibition against "substantial lobbying" with federal subsidies is striking. As the Government explained in its brief in *TWR*, the Internal Revenue Code permits an organization, through election under § 501(h), to spend up to 30% of its exempt-purpose funds for lobbying activities and still qualify for § 501(c)(3) status. "The statute therefore represents a considered accommodation, to the extent consistent with the aims of the exempt organization provisions, of the First Amendment values inherent in legislative advocacy." *TWR*, Brief for Appellants 38-39 n.20. By contrast, § 399 contains no accommodation whatsoever of the First Amendment values inherent in either the noncommercial broadcaster's right of free expression or the public's interest in preserving a free marketplace of ideas.

bility of the Government's characterization of the statute. Instead, particularly when viewed in conjunction with § 399's imprecise fit and disturbing legislative history, these factors strongly suggest that the statute was designed to achieve just what it has produced — the complete suppression of noncommercial broadcasters' opinions on issues of public importance. This, then, is precisely the "very different case" referred to in *TWR* (*see* 103 S.Ct. at 2002; *id.* at 2004 (Blackmun, J., concurring)), the case in which the Court has consistently held that it is unconstitutional to condition the conferral of a government benefit upon the surrender of First Amendment rights.

CONCLUSION

For the above reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

FREDRIC D. WOOCHER
LUCAS GUTTENTAG*
MARILYN O. TESAURO
BILL LANN LEE
CARLYLE W. HALL, JR.
JOHN R. PHILLIPS
Center for Law in the
Public Interest
Attorneys for Appellees

Of Counsel:
TRACY WESTEN

**Counsel of Record*

OCTOBER 1983.

APPENDIX A

47 U.S.C. (Supp. V) 399, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, Title XII, Section 1229, 95 Stat. 730, provides:

> No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office.

APPENDIX B

Editorials Broadcast by Station KNXT, Los Angeles

August 1-August 26, 1983

July 29th and August 1st	*Uninsured Motorists: Putting on the Brakes* — Supports proposed state bill that would impose additional fine on uninsured motorists receiving traffic citations.
August 1st and 2nd	*Arson Watch* — Announces station's "anti-arson month," summarizing scheduled programming aimed at increasing public awareness of the crime of arson.
August 2nd and 3rd	*Campaign Reform: Local Election Fund-Raising Laws* — Urges Los Angeles City Council's Charter and Elections Committee to reform election fund-raising laws, limiting the amount of money that can be raised, setting time limits, and reducing the potential for conflicts of interest on the City Council.
August 4th and 5th	*Reply to an Editorial on Airport Free Speech; Emmett C. McCaughey, Airport Board Commissioner* — States that in restricting location of First Amendment activities to sidewalks in front of terminals at Los Angeles International Airport, Board of Airport Commissioners is properly reconciling needs of travelers and speakers.
August 5th and 8th	*Hunters and Wildlife: Putting up the Bans* — Urges Park Service Advisory Commission to uphold present ban on hunting in Cheeseboro Canyon, a part of Santa Monica Mountains Recreation Area in Los Angeles.
August 5th and 8th	*Reply to an Editorial on Cheeseboro Canyon to Be Kept Off Limits to Hunters; Bob McKay, Private Citizen* — Urges that hunting and related consumptive uses be permitted in Cheeseboro Canyon.
August 8th and 9th	*Reply to an Editorial on Community Colleges; Todd Jones, Past Student President, Long Beach City College* — Argues that proposed community college tuition of fifty dollars per semester is reasonable and necessary.
August 11th and 12th	*Community College Funding: Overriding the Governor's Veto* — Decries Governor's cut in funding of community colleges as pushing the neediest out of a system ostensibly intended to overcome their disadvantages through education.

August 12th and 15th	*Reply to an Editorial on Campaign Finance Reform; Walter Zelman, Common Cause* — Emphasizes need for campaign reform at local level.
August 15th and 16th	*Pound Seizure: Deja Vu* — Speaks out against proposed state bill banning use of pound animals for medical research; but recommends strengthening of rules governing permissible treatment of lab animals.
August 15th and 16th	*Reply to an Editorial on Bus Bill; Sabrina Schiller, Coalition for Clean Air* — Agrees with KNXT's position against proposed state bill that would permit purchase by Southern California Rapid Transit District of polluting buses; recommends legislation to phase in buses that use clean-burning fuels.
August 16th and 17th	*Reply to an Editorial on Animals for Medical Research: Gretchen Wyler, Fund for Animals* — Urges support for state bill banning use of pound animals for medical research.
August 18th and 19th	*Arson: Squashing the Firebugs* — Stresses need for a local coalition of government agencies, police, firefighters, and insurance companies to fight arson.
August 19th and 22nd	*The Metropolitan Water District: Growing at Your Expense* — Takes stand against local water district's proposed rate increase.
August 22nd and 23rd	*The FBI Probe of EPA: Pulling Punches?* — Questions objectivity of FBI probe of EPA's delay in funding the cleanup of local Stringfellow Acid Pits.
August 23rd and 24th	*Orange County's Environmental Mis-Management Agency* — Criticizes Orange County Environmental Management Agency's choice of more expensive alternative means of installing water pipeline.
August 24th and 25th	*Re-Dedicating Resources to Child Abuse: Los Angeles County* — Supports Los Angeles County Supervisor's proposal for a new County Department of Child Abuse to investigate child beatings.
August 25th and 26th	*Drunk Driving Schools: Pass or Fail?* — Supports drunk driving school as an alternative to jail for first-time offenders, but emphasizes need for quality-control monitoring of schools.